Supreme Court, U.S.
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In the

Supreme Court of the United States

LILLIAN HERNANDEZ,

Petitioner,

v.

BOROUGH OF PALISADES PARK
POLICE DEPARTMENT
AND BOROUGH OF PALISADES PARK

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipality can be held liable under § 1983, for a series of constitutional violations committed by officials who are not Policy-makers per se.

2. Whether a municipality can be held liable under the deliberate indifference standard, if Policy-makers ignored obvious constitutional misconduct.

3. Whether under the facts and circumstances of this case municipal liability should attach to the Borough of Palisades, under policy, custom and/or deliberate indifference to Hernandez's constitutional rights.

Including the parties named in the caption of this petition, the parties are:

Petitioner: Lillian Hernandez, an individual.

Respondents: Borough of Palisades Park is a Municipal Corporation, established by New Jersey Law.

Borough of Palisades Police Department is a Law Enforcement Agency established by the Borough of Palisades Park.

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LILLIAN HERNANDEZ, Petitioner, by the undersigned counsel, under the appropriate rules of this court, respectfully requests that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is not reported. The opinion and order of the United States District Court for District of New Jersey (Pet. App. 3a) is not reported.

JURISDICTION

Original jurisdiction in the U.S. District Court for New Jersey was based upon 28 U.S.C. § 1331, 1343, and 42 U.S.C. § 1983.

The judgment of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) was entered on January 29, 2003. The Third Circuit denied a timely petition for rehearing on March 27, 2003 (Pet. App.2a). This Court has jurisdiction under 28 U.S.C. § 1254 (1). This Honorable Court granted a motion for extension of time to submit this petition, to July 15, 2003.

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides that: The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of their life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process law."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 United States Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

Federal Rule of Civil Procedure 56 (c)

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on the file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

A. *General Background and Description.*

Ms. Lillian Hernandez, who is a Hispanic Female lived in the Borough of Palisades Park, New Jersey, from 1987 to 1997. On or about 2-12-1993, Ms. Hernandez pursuant to the Borough's Police Department Policy and/or Practice, notified Police Officer Anderson that she would be away for a few days, and asked him to keep an eye on her home. At the time, the Borough of Palisades Police Department had a policy and practice of encouraging its citizenry to advise the Department when they are away. The purpose of this policy was to afford residents who are away, the extra protection of having police officers keep extra vigilance in safeguarding their property.

The Borough of Palisades Park and the Borough of Palisades Park Police Department are a municipal corporation and a law enforcement agency, respectively. Both entities are charged with the duty of insuring the safety of their citizens and protection of the property thereof. Between 1991 and 1995, the Police Department consisted of seventeen officers. Policies and edicts were set for by the Borough Officials, the Chief of Police and his Designees, whose responsibilities were to guarantee that the police personnel/officers had adequate supervision, training and safeguards to prevent abuse and misuse of the officers knowledge and power.

B. *Ms. Hernandez's Home Was Burglarized By Members Of The Borough's Police Department.*

On February 15, 1993, upon Ms. Hernandez's return from her brief vacation, she discovered that her house had been burglarized and Nine (9) fur coats were

stolen, valued at about $50,000. Both P.O. Anderson and his Commanding Officer, Lt. Giannantonio investigated the crime scene, and Lt. Giannantonio submitted an investigation report. In August 1997, Ms. Hernandez was advised by the FBI that Anderson and Giannantonio were responsible for the burglary at issue, amongst others.

C. *The Police Department Entity's Custom Through The Edicts And Acts Of Its Officials, Injured Ms. Hernandez And Violated Her And Other Citizens' Constitutional Rights.*

During the years 1991 through 1995, at least five of the seventeen members of the Police-force, or about 30%, while using their police status and authority conspired to deprive minority individuals and minority owned businesses of their property without due process of law, while acting under the color of law. These officers included: Lt. John Giannantonio, Sgt. Edward Shirley, Sgt. Brian Maurer, Officer Scott Maresco, and Patrolman Michael Anderson. Eventually, these individuals were convicted of acting under the color of law while using their police status to conspire and commit burglaries and steal property from various residences and business establishments and for depriving individuals and businesses of their property without due process of law.

Former Police Officer Anderson testified that if a police officer wanted something he could have it as long as he kept his mouth shut. Both he and Sgt. Shirley also testified that it was common knowledge around the police department that police officers were committing similar crimes for years. Specifically, Lt. Giannantonio was once investigated by the State Police for theft, and that the Borough Police department suspected that Lt. Giannantonio was responsible for other similar crimes.

There was a pervasive mind-set in force that allowed officers to go unchecked while committing violations, in return for their acquiescence and silence when observing crimes of other fellow-officers.

Before the thefts were committed against Ms. Hernandez, numerous other crimes were committed and covered up by officers of the Police Department. For instance, on May 6, 1992, Anderson radioed Police HQ that he heard an alarm at a grocery store. Under the guise of checking the premises, he inspected the premises. He determined that a security system was in use and a safe was contained on the premises. On July 1, 1992, Anderson and former Sgt. Shirley stole the safe with a large sum of cash. While on official duty investigating the burglary, Lt. Giannantonio spoke with a witness that provided a description of the burglars that closely resembled Anderson and Shirley. Giannantonio filed a false report to protect and deflect attention from his co-conspirators.

On November 16, 1992, a residence was burglarized and currency was stolen by P.O. Anderson and another. Information of what to find and where to find it was given to him by Sgt. Shirley. Moreover, during the burglary, Sgt. Shirley patrolled the area to serve as a watch guard. Most of these violations, if not all, were committed against minority residences and businesses. In 1990, less than 25% of the Borough of Palisades Park's residents were minority, yet more than 60% of the burglaries by the Police agents were committed against minorities.

Moreover, at the relevant time, Chief of Police Lustman, Captain Framarin, the head of the Detective Bureau for the Police Department as well as Lt. Servis knew or were suspicious that Officer Anderson was or

could have been involved in committing the unlawful acts of burglarizing citizen's homes and/or businesses. In 1992, a Security Alarm Company reported to the Police Department that there was strong indication that a Police Officer had committed a break-in and stole from a local business. Furthermore, Officer Anderson testified that Ms. Hernendez's former husband, unknown to her at the time, had indicated his suspicions of Officer Anderson's involvement in the burglary and theft of her fur coats in 1993, and reported it to the Police Department. Yet, nothing was done to rectify the problem and the law enforcement agents were allowed to continue violating the Borough's minority citizen's rights, including that of Ms. Hernandez for a second time, ten days later.

Both former Officers Shirley and Anderson testified that Sergeant Ruh had knowledge of the criminal activities of the Police officers involved. These circumstances did not equate to isolated crimes, rather they equate to custom and practice of crimes committed by the State Actors over the years.

D. *The Police Department's Widespread Practice, Through The Series Of Violations Against Ms. Hernandez And Other Residents Of The Borough Were Deliberately Indifferent To Their Constitutional Deprivations.*

As a senior ranking officer, Lt. Giannantonio, in his capacity as Commanding Officer served at times as the Chief in charge of the entire Department. In this capacity, according to Anderson's testimony, he trained and encouraged his fellow officers to serve as co-conspirators in committing crimes. He also acted as a mentor in the criminal activities to Police Officer

Anderson, Sergeant Shirley, as well as other Officers in the Department.

It was the policy and custom of the Police Department that the highest-ranking officer on the scene would supervise and take charge to insure that a proper and accurate report is obtained so that information is communicated up and down the chain of command. In addition, it was the policy and custom of the Police Department that every report should be reviewed. The report is then placed in a bin for examination by all police officers so that any police officer can provide comments and aid in the investigation of the crime. The report is then submitted to a higher-ranking officer and ultimately to the Chief of Police for his review. Furthermore, it was the policy and custom of the Police Department that when the report is reviewed, a notation of the person who examined it would be marked on every report.

Anderson testified to numerous crimes that he and his fellow Police Officers were able to commit because of the customs and practices of the police-force in training and supervising its personnel in committing Hernandez's burglary and other similar crimes. He as well as others received training from Lt. Giannantonio who taught them how to lie on their reports, how to use their positions as police officers to scout out potential targets in the guise of investigating a break-in, how to make sure that a fellow Police Officer is patrolling the area so that if they set off an alarm, the fellow officer would be the one called to the crime scene enabling him to cover up for them. They were further instructed to carry their badges with them when burglarizing, so that if anybody became suspicious they could just flash their badges. Anderson testified that they had altered crime scenes and lied on reports to

cover-up crimes committed by members of the police force. Lt. Giannantonio coordinated the timing of the crimes with his shift of official duty and then provided to his co-conspirators training and instructions on how to avoid detection.

E. *The Municipality And Its Chief Of Police Failed To Supervise Or Train Its Police Department Members.*

The Borough and Police Chief failed to supervise their police force resulting in numerous thefts occurring in the minority communities of Palisades Park. As a result of the reckless indifference of the Borough's and Chief's actions or inactions, Ms. Hernandez was forced to move out of the Palisades Park Community due to concerns for her safety and her young son's well-being.

Their inaction encouraged the theft and cover up perpetrated by members of its police force. The very institution that was responsible for upholding the law, and protecting its citizens. According to the Borough and Police departments written policies and procedures, the Police Chief, was/is required to set policies and procedures for the police department. However, by custom and practice, during the time at issue, the police chief delegated his authority to his high ranking officers, allowing them to implement his policies and acquiesced to practices set to enforce his policies. Lt. Giannantonio, served as a commanding officer. As such, he was required to direct and control personnel under his command to insure the proper performance of their duties and adherence to established rules, regulations, policies and procedures.

In addition, although responsible for insuring adherence to policies, the Police Chief failed in his duty

to monitor, inspect and guarantee, that the implementation of the policies, through customs set by high ranking officers, adequately insured the Police-force knowledge and compliance with these policies. Police Chief Genovese testified that each Police Officer was required to learn police operations and policies from their supervisors and fellow officers and were given a manual that each officer was required to know and maintain. However, the Chief did not follow through to make sure that every police officer periodically reviewed the manual or even received one. At the relevant time, the Officers training mainly constituted of an on the job training and mentoring.

Moreover, Chief Genovese testified that it was the policy of the police department that when a complaint was filed against a police officer it would go to the internal-affairs officer who would lock it up in a filing cabinet. The Chief further testified that access to the complaints were restricted. In fact, the Chief himself had limited access to the files, and could not identify which officers had complaints against them. Furthermore, Chief Genovese, testified that for the period in question, Deputy Chief Thorpe was the officer in charge of Internal Affairs. This is of significance because Anderson testified that Deputy Chief Thorpe was not just acquiescent to officers committing crimes, but actually participated in facilitating criminal activity.

In Hernandez's case, the Police Department did not follow its own policy and custom and did not review the report because the report contained no notation that it had ever been reviewed. Both Anderson and Shirley testified that Lt. Giannantonio would assist them and others in altering crime scenes and submitting false and inaccurate reports to cover up their crimes. In the matter at hand, Giannantonio omitted from his report

that Ms. Hernandez had informed Officer Anderson that she would be away on vacation, and that there were many footprints in the snow left at the crime scene, by the burglars. In fact, Anderson testified that Lt. Giannantonio deliberately omitted any reference to him or to the snow because many of the footprints belonged to Officer Anderson himself, linking him to the burglary. It was evident that the Police Department acted contrary to its own policies and customs and to the law of the State by not following its own procedures in investigating criminal action and in ensuring that its policies were in fact enforced.

REASONS FOR GRANTING THE WRIT

This case presents a short and well defined record of important questions of federal constitutional law that have not been clearly settled, and therefore, should be by this Honorable Court. The question is whether actual knowledge by the municipality or policy maker is always necessary to hold it liable for a series of unconstitutional acts or culpable conduct of its lower level officials.

I. THE THIRD CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH OTHER CIRCUIT RULINGS THAT ADDRESSED THE SAME ISSUES DEALING WITH MUNICIPAL LIABILITY AS THEY RELATE TO WHAT CONSTITUTE POLICIES OR CUSTOMS OF LOCAL GOVERNMENT UNITS AS WELL AS DELIBERATE INDIFFERENCE TO A CITIZEN'S CONSTITUTIONAL RIGHTS

The decision below is in direct conflict with the Second Circuit Decision in Rookard v. Health and Hospital's Corp. 710 F.2d 41 (2d Cir. 1983); the Fourth Circuit Decision in Randall v. Prince George's County, 302 F.3d 188 (4th Cir. 2002); the Fifth Circuit Decision in Cozzo v. Tangipahoa Parish Council, 262 F.3d 501 (5th Cir. 2001); the Seventh Circuit Decision of Billings v. Madison Metropolitan School Dist., 259 F.3d 807 (7th Cir. 2001); the Ninth Circuit Decision of Brewster v. Shasta County, 275 F.3d 803 (9th Cir 2001); the Tenth Circuit Decision of Olsen v. Layton Hills Tenths Mall, 312 F.3d 1304 (10th Cir. 2002); and the Eleventh Circuit Decision of Cuesta v. School Bd. of Miami, 285 F.3d 962 (11th Cir. 2002). These Circuits have reviewed what constitutes policy or custom in relations to municipal liability pursuant to 42 U.S.C § 1983, under United States Supreme Court rulings. The lower court in Hernandez held that a municipality will not be held liable if the unconstitutional conduct was committed by Officers other than the Policy-makers.

The Second Circuit in Rookard, a case involving wrongful discharge from employment, explained that where an official has final authority over discretion, the choices he/she makes represent government policy.

The court said that a single unlawful discharge, if ordered by a person whose edicts or acts may fairly be said to represent official policy, may support a § 1983 action against a municipal corporation. An official has final authority if his decisions, at the time they are made, for practical or legal reasons, constitute the municipality's final decisions.

The Fourth Circuit in Randall, held that if a Police Force develops an unconstitutional custom or usage, i.e., a widespread practice of a particular unconstitutional method, such custom or usage may be the basis for muncipal liability under § 1983.

The Fifth Circuit in Cozzo, asserted that for purposes of imposing § 1983 liability on a municipality for deprivation of rights pursuant to official policy, an "official policy" is a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the government entity or by an official to whom the entity has delegated policy-making authority, or a persistent, widespread practice of officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents the entity's policy.

The Sixth Circuit in Burkhart, stated that the Supreme Court in Monell v. Department of Social Services, 436 U.S. 658 (1988), did not condition liability on the source of the policy, but held tht the execution of a government injurious policy, whether made by its law makers or by those whose edicts or acts may fairly be said to present official policy, gives rise to municipal liability under § 1983.

The Seventh Circuit in Billings, said, to establish that a municipality has violated an individual's civil rights under § 1983, a plaintiff must show one of the following: (1) that a municipality had an express policy which, when enforced, caused constitutional deprivation, (2) that a municipality had widespread practice which, although not authorized by written law or express municipal policy, was so permanent and well-settled as to constitute a custom or usage within the force of law, or (3) that plaintiff's constitutional injury was caused by a person with final policy-making authority.

The Ninth Circuit in Brewster, found that a county is subject to liability under § 1983, if its policies established by the county's law makers, or by those whose edicts or acts may fairly be said to represent official policy, caused the constitutional violation at issue.

The Tenth Circuit in Camfield, announced that an unconstitutional policy or custom need not be formal or written to create municipal liability under § 1983. The municipality may be held liable when the illegal practice is so permanent and well settled as to constitute a custom or usage with the force of law.

The Eleventh Circuit in Cuesta, declared that a local government body is liable under § 1983 when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.

The lower court is also in direct conflict with the Fourth Circuit Decision in Carter v. Harris, 164 F.3d 215 (4th Cir. 1999); and the Ninth Circuit Decision in Blair v. City of Pomona, 223 F. 3d 1074 (9th Cir. 2000), as to the

issue of what constitutes deliberate indifference to a citizen's constitutional rights.

The Fourth Circuit in Carter, held that supervisory and municipal liability attaches where citizens face a pervasive an unreasonable risk of harm from some specified source and the supervisor's corrective inaction amounts to deliberate indifference or tacit authorization of the officers' practices. In other words, a municipality is liable under § 1983 for deliberate indifference, when it condones the improper behavior in the part of its officers.

The Ninth Circuit in Blair, found supervisory and municipal liability, when an agency's actions or failure to act is a result of a custom, practice or policy of inadequate training that equate to deliberate indifference to the affected individual's constitutional rights. The Ninth Circuit held that in those circumstances, a reasonable fact finder could infer that the series of acts were inflicted by the Police Department members with knowledge and tacit connivance of those running the agency.

Fairness in applying uniformity in the standard of analyzing questions of Federal law is essential and required to maintaining trust in the justice system. The different interpretations between the Circuits as to what constitutes municipal customs, policies and deliberate indifference is more than an academic concern. The variety of interpretation has and continues to result in different results involving cases with similar facts. The Hernandez case is illustrative.

Had Ms. Hernandez's case been heard in Second, Fourth, Sixth, Seventh, Ninth or Tenth Circuits, her claims against the municipality would have proceeded

to trial. A reasonable jury considering the totality of the evidence, and resolving all factual disputes in favor of Ms. Hernandez, could conclude that if adequate and proper policies were followed, the Borough and Chief would have prevented the offenses against her. A reasonable jury could also conclude that the criminal activity dated even further back than the FBI's investigation uncovered, which should have been prevented if the Police Department and Borough had adequate policies in place.

Had the Borough or the Police Department insured the supervision of its officers, and/or followed the proper protocols many of the violations would have been avoided, including the burglaries committed against Ms. Hernandez on 2-14-1993 and 2-23-1993. This is corroborated by the testimony of Anderson, who stated that because of the FBI's investigation, and subsequent training, current members of the police force are more aware, better trained and have since adopted the policy that they would no longer be acquiescent to fellow officers committing crimes. Anderson testified that an officer had asked another officer to take a bribe in return for not prosecuting the DWI offense. However, after the new training the officer refused to take the bribe and reported his fellow officer to authorities. The conflict is clear and irreconcilable. Accordingly, Certiorari is appropriate and required in this matter.

CONCLUSION

THEREFORE, Petitioner Lillian Hernandez respectfully requests of this Court that it Grants her Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail the end of each document)

No. 02-2210

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LILLIAN HERNANDEZ,
Appellant

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT; BOROUGH OF PALISADES PARK

January 13, 2003, Submitted Under Third Circuit L.A.R. 34.1(a)

January 29, 2003, Opinion Filed

COUNSEL: Lillian Hernandez, Pro se, Jericho, NY.

For Lillian Hernandez, Appellant: Lee Nuwesra, New York, NY.

For Palisades Park Police, Borough of Palisades Park, Appellee: Garry J. Furnari, Nutley, NJ. James F. Fine, Law Offices of James F. Fine, Newark, NJ.

JUDGES: Before: SCIRICA, BARRY and SMITH, Circuit Judges.

OPINIONBY: D. Brooks Smith

OPINION: OPINION OF THE COURT

SMITH, Circuit Judge:

Lillian Hernandez appeals the District Court's grant of summary judgment to defendants. Because we agree that appellant failed to introduce evidence of a municipal policy or custom that caused the constitutional violations, we will affirm.

I. FACTS

Appellant Lillian Hernandez is a Hispanic female who lived in the Borough of Palisades Park ("Borough"). The Borough of Palisades Park Police Department had a policy of encouraging citizens to advise the department when they would be away from home. On February 12, 1993, Ms. Hernandez informed Police Officer Michael Anderson that she would be away from home for a few days and asked him to keep an eye on her residence. Anderson promised that he would do so. But rather than fulfill his duty to protect Ms. Hernandez's property, Anderson, with the approval of Lt. John Giannantonio, used this opportunity to rob Hernandez's home. The robbery was part of an ongoing string of robberies which were committed by five Borough police officers beginning in 1992. n1

On February 15, 1993, Ms. Hernandez returned from her vacation to find that nine of her fur coats had been stolen. There was another attempted burglary of Ms. Hernandez's residence on February 23, 1993, although nothing was stolen on that occasion.

In 1994, the Police Department began investigating police corruption and turned over its findings to the Bergen County Prosecutor's Office. This investigation resulted in the indictment of Anderson and the four other police officers in 1997. Anderson eventually pleaded guilty.

II. PROCEDURAL POSTURE

Appellant filed a complaint against the Borough and its Police Department under 42 U.S.C. § 1983 for violation of her rights pursuant to the First Amendment (violation of privacy), Fourth Amendment (illegal search and seizure), Fifth Amendment (taking) and Fourteenth Amendment (violation of due process and equal protection because the robberies allegedly were committed disproportionately against minority citizens). She alleged that the Police Department and Borough had a custom of committing these robberies and negligently trained and supervised the rogue officers. The District Court granted summary judgment on behalf of the defendants.

III. JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over the appeal based on 28 U.S.C. § 1291.

IV. STANDARD OF REVIEW

This Court exercises plenary review over a district court's order granting summary judgment. See Reitz v. County of Bucks, 125 F.3d 139, 143 (3d Cir. 1997). Summary judgment must be granted if "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of fact exists "only if a reasonable jury, considering the evidence presented, could find for the non-moving party." Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). Although the moving party must initially point out the absence of evidence necessary to

the non-moving party's case, once it has done so, the burden shifts to the non-moving party to provide evidence to support each element of the party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The court must consider all evidence in the light most favorable to the non-moving party. See Marzano v. Computer Sci., 91 F.3d 497, 502 (3d. Cir. 1996); White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). Nonetheless, the evidence produced by the plaintiff must be more than a "mere scintilla. " Anderson, 477 U.S. at 249.

V. LEGAL ANALYSIS

Appellant alleges that the District Court erred in granting summary judgment to both defendants because: 1) it required appellant to provide evidence supporting every element of her case; 2) it resolved material issues of fact by concluding that the pattern of robberies could not in itself put the policymaker on notice of the constitutional violations; and 3) it failed to recognize that a municipality can be liable for failure to train its employees and failure to adequately supervise in order to prevent corruption. n2

First, as the District Court recognized, police departments cannot be sued alongside municipalities because a police department is merely an administrative arm of the municipality itself. See Bonenberger v. Plymouth Township, 132 F.3d 20, 25 n.4 (3d Cir. 1997); Colburn v. Upper Darby Township, 838 F.2d 663, 671 n. 7 (3d Cir. 1988). Therefore, the District Court properly granted summary judgment as to the Borough of Palisades Park Police Department.

Second, contrary to appellant's assertions, it is proper for a district court to grant summary judgment when a

plaintiff fails to produce any evidence on a necessary element of her claim. See Celotex, 477 U.S. at 323-25. Appellant need not try her case by carrying the burden of persuasion, but she must, at a minimum, produce evidence on every element of her claim.

Third, the District Court did not resolve any material issue of fact, nor did it reject the possibility that a municipality may be liable for its policies or customs. Rather, the District Court appropriately concluded that although specific police officers did commit constitutional violations, appellant introduced no evidence suggesting that the Borough had an official policy or custom of committing such violations.

The Borough may be liable for the constitutional violations of its police officers only to the extent that the injuries arose from its policies or customs. See, e.g., Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 694-5, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295-6 (3d Cir. 1997); Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996). The mere fact that Borough employees committed the burglaries is insufficient because municipalities cannot be held liable in a Section 1983 suit under the doctrine of respondeat superior. See id.

A policy may be made only when a policymaker issues an official proclamation or decision. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations omitted). A "policy-maker" is an individual with final and unreviewable authority to make a decision. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality op.); Beck, 89 F.3d at 971; Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990). Appellant argues that because Lt. Giannantonio probably served as

the Commanding Officer at some point during his career, and the Commanding Officer is the officer in charge, Giannantonio's participation in the robbery scheme transformed that scheme into Borough policy. However, as the District Court recognized, appellant introduced no evidence to suggest that Giannantonio was the Commanding Officer at the time the robberies were taking place, or that the Commanding Officer had final authority to set municipal policy. Accordingly, even viewing the evidence in the light most favorable to appellant, she has not produced sufficient evidence to establish a Borough policy.

A custom may exist where the relevant practice is so permanent and "widespread as to have the force of law." Bryan County Commissioners v. Brown, 520 U.S. 397, 404, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). To show custom, the plaintiff may adduce evidence that a policy-maker (1) had notice that a constitutional violation was likely to occur, and (2) acted with deliberate indifference to the risk. See Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. n.14 (3d Cir. 1989). Generally, notice is established through a pattern of known prior constitutional violations. See Brown, 520 U.S. at 409-10; Berg, 219 F.3d at 276; Beck, 89 F.3d at 973 (holding that pattern of written complaints of violence against an officer sufficient for reasonable jury to conclude policymaker knew or should have known of violations); Bielevicz, 915 F.2d at 851 (policymakers must be aware of similar unlawful conduct in the past but fail to take action to prevent future violations). In rare instances, however, a constitutional violation may be such a "known and obvious" or "highly predictable consequence" of an ongoing course of action that knowledge of past violations is unnecessary. Berg, 219 F.3d at 276 (holding that municipality had notice and was deliberately indifferent to the risk of

unconstitutional arrests from erroneously issued warrants even though no mistakes had been made in the past); cf. City of Canton v. Harris, 489 U.S. 378, 390, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) (city liable when "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need") (emphasis added).

In this case, both New Jersey statutes and the Borough's own Police Manual establish that the Chief of Police was the relevant policymaker. See N.J. Stat. Ann. § 40A:14-118 (where position of Chief of Police is established, this position "shall be the head of the police force and ... shall be directly responsible to the appropriate [municipal governing] authority for the efficiency and routine day-to-day operations thereof"); Police Manual 5:1.1-1.2, 6.1, 6.1.4 (noting that Chief of Police is highest ranking officer, that "command shall be exercised by the virtue of rank" and that the Chief shall have "complete authority over all police personnel functions and operations" and shall "set[] the administrative policies of the department"). Although it is clear that there was a series of robberies by police officers in years prior to 1993, the year the Hernandez burglary took place, the District Court concluded that the robberies were not municipal custom because appellant introduced no evidence suggesting that the Chief of Police knew or should have known that his officers were robbing citizens.

Appellant first argues that the existence of a widespread pattern of prior robberies was enough for a reasonable fact-finder to conclude that the policymaker should have known about the constitutional violations. A reasonable

fact-finder may conclude that a Police Chief has constructive knowledge of constitutional violations where they are repeatedly reported in writing to the Police Department. See Beck, 89 F.3d at 973 (the existence of repeated written citizen complaints about abuse of force by a police officer would be enough to support a conclusion that the policymaker knew or should have known of the violations). In addition, "constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them." Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989) (quoting Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987)). Unlike Beck, where written complaints clearly alleged that a police officer was acting unconstitutionally, or Bordanaro, where officers made no attempt to hide the fact that they would regularly break doors down without warrants, the mere existence of past robberies in the Borough is insufficient to establish that the Police Chief had constructive knowledge that the robberies were being committed by police officers.

Appellant next points to several pieces of evidence that the District Court did not consider which she argues support the existence of an unconstitutional custom. She notes that in 1992, an alarm company orally suggested to Lt. Giannantonio that a police officer may have committed the burglary of a restaurant. However, this is insufficient for a reasonable jury to conclude that a policymaker knew or should have known about the constitutional violations. It was a single incident, it was conveyed orally, and Giannantonio promised Anderson that he would not tell anyone else about it. There is also no evidence that this information ever reached the Police Chief. Appellant also observes that her husband

told an officer that he thought Anderson was responsible for the burglary of appellant's home. But since this happened after the burglary had taken place, it cannot demonstrate prior knowledge and deliberate indifference by the Police Chief. See Beers-Capitol v. Whetzel, 256 F.3d 120, 137 (3d Cir. 2001) (requiring plaintiff in a § 1983 action to demonstrate "that the defendant knew of the risk to the plaintiff before the plaintiff's injury occurred").

Appellant also argues that in 1992 there were rumors circulating within the Police Department that Anderson and Sgt. Edward Shirley were committing burglaries. There is no evidence, however, that the Police Chief heard these rumors. As we observed in Johnson v. Elk Lake School District, 283 F.3d 138, 144 n. 1 (3d Cir. 2002), until the rumors are brought to the attention of a policymaker, they cannot constitute evidence that a policymaker knew or should have known of the violations. Cf. also Beers-Capitol, 256 F.3d at 140 (Section 1983 claims against individual employees for 8th Amendment violation based on sexual abuse of youth inmates).

In Johnson, this Court declared that summary judgment was properly granted to the defendant school district on plaintiff's Section 1983 claim for sexual abuse by a school counselor because

Johnson presented no evidence that [the rumors] were ever brought to the attention of a supervisory or policymaking official. Moreover even if school officials had been made aware of these stories . . . we share the District Court's reluctance "to impose on the district an obligation to treat as true, all rumors, until proven otherwise." In the absence of any direct complaints made to school officials, the mere floating around of

unsubstantiated rumors regarding a particular employee-particularly in the high school setting which is notoriously rife with adolescent gossip - does not constitute the kind of notice for which a school district can be held liable.

283 F.3d at 144 n.1. Similarly, in Beers-Capitol, this court affirmed the grant of summary judgment for a supervisor, despite the fact that he had heard rumors of sexual abuse among the inmates at the youth detention facility, because "there [was] no evidence that [the supervisor] believed these allegations were likely to be true or that the evidence surrounding the allegations was so strong that he must have believed them likely to be true." 256 F.3d at 140.

Appellant's case is slightly stronger than Johnson or Beers-Capitol because a police station does not have the same potential for unsubstantiated gossip as a high school or youth detention center, and the requirement in Beers-Capitol that the individual must subjectively believe the rumor only applies in the context of Eighth Amendment violations. See Farmer v. Brennan, 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) (requiring subjective knowledge by prison official to make out an Eighth Amendment violation). Nonetheless, while it might be proper to attribute to a policymaker constructive knowledge of repeated written citizen complaints, rumors are too insubstantial to deserve similar treatment. As in Johnson, the existence of rumors cannot be enough to infer knowledge on the part of the Police Chief in the absence of any evidence that those rumors were brought to his attention. Therefore, even viewing this evidence in the light most favorable to the appellant, it is insufficient for a reasonable jury to conclude that the Police Chief knew or should have known that his officers were committing constitutional

violations by robbing citizens. Accordingly, the Police Chief's failure to investigate these rumors in 1992 and take action against the offending officers did not constitute deliberate indifference to a known risk of constitutional violations.

Neither can appellant prevail on her theory that the Borough had a custom of deliberate indifference through failure to train or inadequate supervision. Appellant analogizes to Berg, 219 F.3d 261, and Powpow v. City of Margate, 476 F. Supp. 1237 (D. N.J. 1979), to suggest that this is an instance where a violation of a constitutional right is so likely to result from a failure to train or supervise, especially in light of the high degree of nepotism within the Department, that it rises to the level of deliberate indifference. Berg involved the issuance of warrants by typing a number into a computer database, and the court recognized that because merely typing one digit incorrectly would result in the issuance of a warrant for the wrong individual, the potential for constitutional violations was obvious. Here, it was hardly obvious that police officers, sworn to uphold the law, would burglarize the homes of the very citizens whom they were duty-bound to protect because they lacked training that instructed them that such activity was unlawful.

Powpow, upon which appellant also relies, is also inapposite. It involved the death of an innocent bystander based on the police officer's reckless use of his weapon. Based on the high risk that individuals might be injured by improper use of weapons, the District Court held that there was an obvious constitutional risk arising from failing to sufficiently train officers in the use of service weapons in residential areas. Here, there is nothing to suggest that there is an inherently high risk that police officers will commit

robberies absent ethics training. Thus, the failure to train police officers that they should not commit burglaries, or the failure to supervise them to ensure that they do not commit such felonies, is not so likely to result in a violation of a constitutional right as to demonstrate deliberate indifference by Borough policymakers.

VI. CONCLUSION

The order of the District Court should be affirmed.

D. Brooks Smith
Circuit Judge

FOOTNOTES

n1 The Police Department had only 17 police officers, so that approximately 30 of all the officers were involved in the burglary ring.

n2 Appellant also urges us to address whether her complaint was filed in a timely manner, despite the fact that this issue was not reached by the District Court. We decline this invitation. See Virgin Island Conservation Soc., Inc. v. Virgin Island Bd. of Land Use Appeals, 881 F.2d 28, 36 (3d Cir. 1989) (refusing to engage in substantive review of issues not addressed by district court).

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-2210

LILLIAN HERNANDEZ,
Appellant

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT; BOROUGH OF PALISADES PARK

D.C. 99-CIV-4182

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and SMITH, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available *circuit* judges of the circuit in regular active service, an.d no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel, and the Court en banc, is denied.

BY THE COURT:

Circuit Judge
Dated: March 27, 2003

Supreme Court, U.S.
FILED

03 139 JUL 15 2003

In the

Supreme Court of the United States

LILLIAN HERNANDEZ,

Petitioner,

v.

BOROUGH OF PALISADES PARK
POLICE DEPARTMENT
AND BOROUGH OF PALISADES PARK

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

SUPPLEMENTAL APPENDIX

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(Any footnotes trail the end of each document)

Civ. No. 99-3956 (WGB) ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LILLIAN HERNANDEZ,
Plaintiff,

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT and BOROUGH OF PALISADES PARK,
Defendants.

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BASSLER, DISTRICT JUDGE:

Plaintiff Lillian Hernandez has brought this action pursuant to 42 U.S.C. § 1983, alleging that Defendants Borough of Palisades Park Police Department and the Borough of Palisades Park ("Defendants") are responsible for violations of her civil rights. Defendants move for Summary Judgment pursuant to Fed. R. Civ. P. 56. The Court has jurisdiction pursuant to 28 U.S.C.

§§1331, 1332 and 1367. For the following reasons, Defendants' motion is granted.

I BACKGROUND

It is undisputed that in February 1993, while Plaintiff Lillian Hernandez was away on vacation, her home in the Borough of Palisades Park was burglarized. Following the burglary:

Plaintiff reported to the police that eight fur coats valued at approximately $50,000 had been stolen. Approximately one week later Plaintiff reported another attempted burglary of her home, but reported that nothing had been taken.

The burglary of Plaintiff's home was one of a number that occurred in Palisades Park between 1991 and 1993.[1] Ultimately an investigation by the Bergen County Prosecutor's Office and the FBI determined that a group of rogue police officers (approximately 5 of Palisades Park's 17 officers) had been burglarizing homes in the Borough and covering them up by falsifying their investigation records. Plaintiff argues that the vast majority of the officers' targets were female and minority residents of the Borough.[2]

Plaintiff has submitted the Deposition transcript of current Palisades Park Police Chief John Genovese, who recounted at length that the investigation into the burglaries began as early as 1994, when a Ms. Shu3 reported that she believed police were responsible for the burglary of her home. (Genovese Dep. II, 53:1-62:23.) According to Chief Genovese, the former Chief of Police performed a preliminary investigation, and "immediately" turned the allegation of criminal conduct by officers over to the Bergen County Prosecutor's

Office. (Genovese Dep. II, 78:7-9.) Plaintiff has not provided any other evidence regarding victim complaints to the Department; there are no details in the record of other reports that were made accusing officers of other burglaries, or evidence that any earlier reports might have been made and ignored. The only evidence in the record on the subject of complaints to the department is the testimony of chief Genovese. (Genovese Dep. I, 60:25-61:9, 65:12-24; See also Trial Testimony of Officer Anderson, fn. 4, infra.)

According to Hernandez, the police burglarized her home because they knew she would be away on vacation. The police knew she would be away on vacation because she had told Officer Michael Anderson of her planned trip, and asked him to look after the residence. Plaintiff claims that he told her not to worry, and indicated he would "keep an eye on the house." Instead, it is undisputed that Officer Anderson and others burglarized the residence while Plaintiff was away.

At the time Plaintiff told Officer Anderson of her pending vacation, the Police Department had a policy of seeking information from residents about any vacations they might take, so that the Department could keep watch on their residences. Any information submitted by residents was kept by the Desk Officer, who would make it available to other members of the Department. (Genovese Dep. I, 93:13-94:23.)

Officer Anderson ultimately pled guilty to the burglary of Plaintiff's home. At the trial of Lieutenant Anthony Giannantonio, Anderson testified that he and two other officers burglarized the residence. He indicated that Lieutenant Giannantonio, Anderson's commanding officer in the Detective Division, assisted in covering up

the Hernandez burglary by falsifying reports of the incident after the fact.[4] Giannantonio was ultimately convicted of conspiracy to commit burglary and other charges, partly as a result of the Hernandez burglary.

Plaintiff is adamant that she was not aware officers were responsible for the burglary of her home until August, 1997, despite the fact that her estranged ex-husband had allegedly reported his suspicions to the police some time earlier. Hernandez contends that it was not until August, 1997, when she was informed that Officer Anderson pled guilty to the burglary of her home, that she knew the police were involved.[5]

On July 12, 1999, Hernandez filed a complaint in the Southern District of New York, alleging that her Constitutional rights were violated.6 Specifically, she claims that when the officers broke into her home, her First Amendment (violation of privacy), Fourth Amendment (illegal search and seizure), Fifth Amendment (taking) and Fourteenth Amendment (due process and equal protection) rights were violated. Hernandez's complaint alleges that Defendants should be held liable pursuant to 42 U.S.C. §1983 because they negligently hired, trained, and supervised the rogue officers. Hernandez seeks a declaratory judgment against Defendants for their § 1983 violations, injunctive relief, compensatory damages for the loss of the coats ($50,000), damages for emotional distress ($500,000), punitive damages, and attorneys' fees.

II DISCUSSION

A. Summary Judgment Standard

The standard for granting summary judgment pursuant to Federal Rule of Civil Procedure 56 is a stringent one.

Summary judgment is appropriate only if all the probative materials in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. p. 56(c); Hersh v. Allen Prods. Co., 789 F.2d 230, 232 (3d Cir. 1986); Lana v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Healy v. New York Life Ins. Co., 860 F.2d 1209, 1219 n.3 (3d Cir. 1988)

The court must resolve all reasonable doubts in favor of the nonmoving party when determining whether any genuine issues of material fact exist. Never v. Riegel Prods. Corp., 720 F.2d 303, 307 n.2 (3d Cir. 1983); Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). Even though a court must resolve reasonable doubts in favor of the nonmoving party, because a motion for summary judgment is designed to go beyond the pleadings, factual specificity is required of a party who opposes such a motion. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Accordingly, in order to defeat a properly supported motion for summary judgment, a party may not merely restate the allegations of its pleadings, or rely upon self-serving conclusions, unsupported by specific facts in the record. Celotex, 477 U.S. at 322-23; Farmer v. Carlson, 685 F. Supp. 1335, 1339 (M.D. Pa. 1988). A non-moving party must point to concrete evidence in the record which supports each essential element of its case. Id. If the party fails to provide such evidence, then it is not entitled to a trial and the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(e).

B. Liability of the Police Department vs. Liability of the Borough

As an initial matter, the Court notes that Plaintiff has sued both the Borough of Palisades Park and the Borough of Palisades Park Police Department, but not any of the individual officers who actually burglarized her home.[7] Plaintiff's first cause of action is styled "Violation of 42 U.S.C. section 1983 against Borough of Palisades Park Police Department." (Complaint p. 6.) Plaintiff's second cause of action is styled "Violation of 42 U.S.C. Section 1983 against Borough of Palisades Park." (Complaint p. 8.) Plaintiff's complaint contains no other causes of action.

In her complaint, Plaintiff stated that the Police Department "is a law enforcement agency of Defendant Borough of Palisades Park duly authorized to act on its behalf, under color of law." (Complaint, ¶ 7.) Mindful of this statement, Defendants argue that because liability can not attach to both a Police Department and to a municipality at the same time in a § 1983 action, summary judgment should be awarded to Defendants on Plaintiff's claim against the Borough of Palisades Park Police Department.

Numerous courts have held that "in Section 1983 actions, police departments cannot be sued in conjunction with municipalities, because the police department is merely an administrative arm of the local municipality, and is not a separate judicial entity." See DeBellis v . Kulp, 166 F.Supp.2d 255, 264 (E.D. Pa. 2001) (collecting cases). Accordingly, Defendants' motion for summary judgment as to the Borough of Palisades Park Police Department is granted. The Court's inquiry will instead focus on whether the Borough of Palisades Park itself can be held liable for the conduct of its Police

Department and police officers.

C. Plaintiff's § 1983 Claims

1. Agency Liability

Plaintiff's Complaint primarily contends that "this action arises under 42 U.S.C. § 1983, in that Defendants Borough of Palisades Park Police Department, and Borough of Palisades Park, through the conduct of their agents, violated Plaintiff's right[s]." (Complaint, ¶ 1) (emphasis added.) 42 U.S.C. § 1983 provides for a cause of action against:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

42 U.S.C. § 1983. Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating Federal rights already conferred.'" Graham v. Connor, 490 U.S. 386, 393-94 (1989).

Although § 1983 may be used to obtain recovery from a municipality for constitutional injuries, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell v. New York City Dept. Of Social Services, 436 U.S. 658, 691 (1978). In keeping with Congressional intent, in Monell the Supreme Court absolutely foreclosed municipal § 1983 liability on the basis of respondeat superior. Id. Instead, Monell and its progeny direct that a municipality may be held liable only for acts or failures of the municipality

itself, and not for the acts or failures of its employees; this ensures that municipal liability is "limited to action for which the municipality is actually responsible." Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986) .

To the extent that Plaintiff seeks to recover pursuant to §1983 because Defendants violated her rights "through the conduct of their agents," her claims can not succeed as a matter of law, and must be dismissed.

2. Direct Municipal Liability

Even though respondeat superior liability in § 1983 actions has been foreclosed by the Supreme Court, a plaintiff may still recover against a municipality for constitutional violations that occur at the hands of municipal employees, provided that some link exists between the conduct and the municipality. Plaintiff contends that such a link exists for a variety of reasons. Hernandez alleges that the municipality should be held liable because it breached its duty to her when it failed to employ honest and trustworthy officers, and then failed to adequately train and supervise then. Plaintiff further contends that the municipality should be held liable because it failed to prevent and/or adequately investigate the crimes committed by its officers, which were overwhelmingly committed against females and minority residents (Hispanics and Koreans). Plaintiff theorizes that although Defendants knew or should have known of this pattern of discriminatory conduct on the part of its officers, they failed to take appropriate action to prevent the harm, and as a result evidenced deliberate indifference to the violations of Plaintiff's rights.

In order to recover from a municipality via § 1983, a plaintiff may demonstrate a direct causal link between

their injury and the municipality by demonstrating that the violation of their constitutional rights was caused by either a policy or custom of the municipality. Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000), citing Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir, 1996). Policy is made when a decisionmaker possessing final authority to establish municipal policy with respect to the action issues an official proclamation, policy or edict. Customs are practices of state officials so permanent and well settled as to virtually constitute law." Berg, 219 F.3d at 275 (internal quotations and citations omitted).

A. Giannantonio's Conduct as Municipal Policy

In her brief in opposition to summary judgment, Plaintiff argues that because Lieutenant Giannantonio served in a command position and directed junior officers to commit crimes, he established a municipal policy of violating the rights of minority residents by burglarizing them. Although it is undisputed that Lieutenant Giannantonio was a high-ranking member of the Police Department and a part of the burglary conspiracy, and although it is undisputed that a number of his subordinates were complicit in the burglary plot, there mere fact that he had command authority is not sufficient to transform his con4uct and directions to subordinates into municipal policy.

To determine whether an act is properly attributable to the municipality, instead of attributable to one of its employees, the Supreme Court has guided that "municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur, 475 U.S. at 481. More specifically, "municipal liability under § 1983 attaches where and only where a

deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Id. at 483.

At his deposition, current Palisades Park Police Chief John Genovese testified that at "some point in his career" Giannantonio "must have" served as a commanding/senior-ranking officer. (Deposition of Chief John Genovese, 26:22-27:3.) Plaintiff relies on this statement heavily in attempting to make her case that the burglary of her home, allegedly at Giannantonio's direction, amounted to municipal policy.

Plaintiff's theory is unavailing, however, because Plaintiff has produced no evidence that Giannantonio was the senior-ranking officer at the time of the burglaries. Even if he had been! Plaintiff's argument would still fail because Plaintiff has provided no evidence that in those instances where he served as the senior-ranking officer, Giannantonio had "final" authority to set municipal policy.

Plaintiff's unsupported claims are further weakened by the Police Policy Manual Plaintiff herself submitted as evidence. Section 5:1.1 of the Manual demonstrates that as a Lieutenant, Giannantonio would typically have reported to a Captain. The Captain, in turn, would have reported to the Chief of Police. Although the Chief of Police arguably had the authority to set municipal policy at least as far as the Police Department was concerned, Plaintiff has produced no evidence that the Chief of Police was ever aware of the burglary ring, or that he somehow authorized the burglaries.

While Giannantonio could theoretically have found himself serving in the role of the Chief of Police in the

event that all of his superiors were absent, by rule even in that position he would have been bound to follow existing protocols and policies. Section 5:1.4 of the Manual states:

Members of the department who may be placed temporarily in the position of a member of higher rank by proper authority, shall exercise the authority and perform the duties of such higher position, and shall be held responsible in like manner as if regularly appointed to higher office. They shall not alter or countermand any order issued by the member whose place they temporarily occupy, except when expediency demands."

(Emphasis in original.) Even when not occupying a higher position, but serving directly in a commanding position, "a commanding officer has direct control over all members and employees within his command" expressly "subject to direction from higher authority." (Manual Section 5:1.5 (emphasis added.))

At his deposition, Chief Genovese stated that Departmental policy was for officers to uphold the rules and regulations of the department on a twenty-four-hour basis. He further stated that as a matter of policy, criminal conduct by officers of the department would not be tolerated, whether the officers were on or off duty. (Genovese Dep. 82:6-24.) Clearly, the conduct of the rogue officers in this case, including Giannantonio, would have run against that policy. For that reason, absent any evidence that Lieutenant Giannantonio was directed by "a decisionmaker possessing final authority to establish municipal policy with respect to" having those beneath him commit crimes, he himself would have been acting in violation of municipal policy as set by the Chief of Police.

Absent evidence that 1) Giannantonio was directed from above, 2) evidence that Giannantonio's superiors were aware of his misconduct and approved of it, or 3) evidence that Giannantonio himself was acting with final decisionmaking authority, it is not appropriate to impute his gross misconduct to the municipality. Accordingly, Defendants are entitled to summary judgment to the extent that Plaintiff seeks to recover for Giannantonio's supervisory role in the burglary conspiracy.

B. The Borough's Failure to Screen, Train, & Supervise

Distinct from Plaintiff's claim that the burglaries themselves amounted to an unconstitutional policy for which the Borough should be held liable, Plaintiff claims that the Borough had a policy and/or custom of not adequately screening,[8] supervising and/or training its employees, that resulted in her constitutional injuries. Part of this claim includes her contention that the Department did not adequately train its officers that it was inappropriate to take information gathered from residents who intended to go on vacation and use it to burglarize female minority residents.

Having identified a municipal policy or custom (namely failing to adequately screen, train, and supervise), Plaintiff must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Berg, 219 F.3d at 276, quoting Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404 (1997). Because municipal customs of failing to screen, train, or supervise employees do not violate federal law in and of themselves, Plaintiff can only succeed "by 'demonstrating that the municipal action was taken with 'deliberate indifference' as to its known

or obvious consequences. A showing of simple or even heightened negligence will not suffice." Id.

The 'deliberate indifference' standard was articulated by the Supreme Court in City of Canton v. Harris, where the Court was confronted with the question of whether a municipality could be held liable for a "concededly valid policy" that was "unconstitutionally applied by a municipal employee . . . if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train." 489 U.S. 378, 388 (1989). The Supreme Court agreed with a number of the Courts of Appeals and concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." Id. Those circumstances are narrowly confined to instances where "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id.

In clarifying the deliberate indifference standard, the Court wrote that "only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a. city be liable for such a failure under § 1983." Canton, 489 U.S. at 389. It is not sufficient to demonstrate "that an injury or accident could have been avoided if an officer had had better or more training," because "in virtually every instance where a person has had [her] constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident." Id. 489 U.S. at 391-92. Instead, § 1983 claims against municipalities "can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants."

The Third Circuit has embraced a three-part test to determine whether a municipality's failure to train or supervise amounts to deliberate indifference. A plaintiff must show that "(1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (footnote omitted). As in Carter, Plaintiff has clearly met the first and third elements; the Borough must have known its officers would be presented with opportunities to steal from municipal residents, and known that such thefts would almost certainly result in deprivations of constitutional rights. Carter, 181 F.3d at 358. Even so, and also as in Carter, it is much less clear if Plaintiff has met the second element, namely whether the "situation [that led to the constitutional violation] involve[d] a difficult choice or a history of employee mishandling." Id.

Plaintiff Hernandez argues that "given the possibility for abuse [stemming from the policy of collecting information about absent residents], the police department did not take steps to train its members or to develop a system of checks and balances
that could have prevented abuse of the power and trust that the department encouraged its citizens to invest in it. This failure constitutes deliberate indifference." (Plaintiff's Opp. Brief, p. 13.)

Plaintiff's argument silently turns on a number of unfounded, interconnected assumptions. First, that a police department may subject itself to liability by erroneously believing that its officers will adhere to their oaths and avoid criminal conduct.[9] Second, that the Borough's policy of collecting information about

resident absences made the need to train officers about not using this information to burglarize residents "obvious." Third, that the Borough knew or should have known that increased supervision of officers was required to ensure that information collected from residents would not be used to break into residents' homes. Finally, that having information about absent residents in and of itself presented officers with a "difficult choice" that was likely to lead to constitutional violations absent training on the subject.

To support the foregoing assumptions, Plaintiff's argument relies heavily on the Third Circuit's opinion in Carter, where the Court directed:

city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent. Moreover, a failure by police officers to resist these opportunities will almost certainly result in deprivations of constitutional rights . . . [A]lthough it may usually be appropriate to assume employees will obey their oaths and the perjury laws, where there is a history of conduct rendering this assumption untenable, city policymakers may display deliberate indifference by [assuming employees will obey their oaths.]

[Plaintiff] should be allowed to pursue discovery in order to determine whether there was a practice of condoning perjury (evidenced perhaps by a failure to discipline perjury) or a pattern of police misconduct sufficient to require the police department to train and supervise officers to assure they tell the truth.

181 F.3d at 357 (internal quotations, citations, and footnotes omitted).

Because multiple police burglaries occurred in Palisades Park, Plaintiff argues there is "a history of conduct rendering the assumption [that officers would adhere to their oaths] untenable," sufficient to demonstrate that the municipality should not have relied on the assumption that its officers would behave lawfully. Plaintiff theorizes that given the number of burglaries that occurred, the Borough was deliberately indifferent when it failed to train officers not to burglarize minority residents' homes. Plaintiff also claims (without any support) that the Borough knew or should have known about the string of burglaries, but did nothing about them.

While a pattern of constitutional violations is often sufficient to demonstrate deliberate indifference, a necessary element to establish liability is that the municipality be actually or constructively aware of the violations. As the Third Circuit guided, causation can be shown by a "municipality's failure to act, once it was on notice that its procedures were constitutionally deficient." Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990) (emphasis added). A municipality may be liable in such a circumstance because "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future." Id. In essence, "a municipal custom may be established by proof that officials with policymaking responsibility knew of and acquiesced in an unlawful course of conduct." Bielevicz, 915 F2d at 854.

Although a string of constitutional violations did occur in this case, there is no evidence in the record to allow a trier-of-fact to conclude that Defendants' were deliberately indifferent to the prospect of violations or to the violations themselves. Plaintiff has failed to provide any evidence that the municipality was aware

information it gathered from residents was being used to commit burglaries, or even that police officers were engaged in a conspiracy to break into residents' homes. The only evidence in the record about Borough knowledge of the crimes is that as soon as Mrs. Hsu filed a complaint alleging that she had been robbed by police, the department commenced an investigation, and handed the matter over to the Bergen County Prosecutor's Office. This ultimately led to the convictions of those responsible, and to an end of police burglaries in Palisades Park.[10]

Plaintiff has failed to present any evidence that would support a finding of deliberate indifference by Palisades Park. She has failed to present any evidence that the municipality knew of the burglaries when they had happened, or that it did not act on reports of police involvement. Having failed to demonstrate any actual knowledge of the pattern of violations, Plaintiff has further failed to demonstrate on what basis the Borough "should have known" about the burglaries, or should have known that its policy of collecting information from absent residents was being abused, Similarly, Plaintiff has provided no evidence that burglaries were such an "obvious" result of police policy that Palisades Park was deliberately indifferent in not ordering additional training about not engaging in burglary, or in not ordering additional supervision to prevent police burglaries. In short, while Plaintiff has presented evidence that she was burglarized by police officers, she has not presented any evidence to tie this burglary to the Borough via municipal policy, custom, or deliberate indifference.

Even assuming Plaintiff had been able to show that the municipality was deliberately indifferent in failing to train and supervise its officers, Plaintiff would still have

had to show that this failure in training and supervision "actually caused" the rogue officers to break into her home. Carter, 181 F.3d at 357 n. 60, citing Canton, 489 U.S. at 391 (requiring plaintiff to prove his injury "resulted from" the failure to adopt a policy). Such a showing is made by demonstrating that "the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect."

Although Plaintiff has made an adequate showing that her rights were violated by Borough officers, she has failed to demonstrate that the violations would have been averted had a different training or supervisory regimen been implemented. While Plaintiff has submitted excerpts from the Palisades Park Officer's Manual for the Court's consideration, she has not indicated which portions she believes to be deficient, or provided any evidence (or even argument) about what modifications would have prevented her constitutional injury.

Plaintiff's only express contention regarding the manner in which Palisades Park failed to train its officers is that the municipality "failed to take appropriate action to train its officers concerning Sexual and Racial Discrimination." (Complaint ¶¶ 45, 56.) Given the nature of the constitutional violations that occurred here, the Court finds this contention to be decidedly wide of the mark. Even assuming that the victims of the officers' crimes were disproportionately minority women, the most that better sexual and racial discrimination training would have accomplished would have been to generate a more diverse group of burglary victims.

More critical to Defendants' summary judgment motion, Plaintiff has not provided the Court with evidence of any

kind related to the officers' training. She has not provided the Court with information on what type of training they received before they joined the force, or whether that training continued after they joined the force. Without evidence to consider about the manner in which the Borough of Palisades Park trained its officers, no reasonable jury could make a determination that the training was somehow deficient, let alone that it was the proximate cause of Plaintiff's injury.

The Court is mindful that in determining whether a failure to train amounts to deliberate indifference, "the focus . . . is on the adequacy of the training program in relation to the tasks the particular officers must perform and the connection between the identified deficiency in the . . . training program and the ultimate injury." Reitz v. County of Bucks, 125 F.3d 139. 145 (3d Cir. 1997.) Because Plaintiff has not placed any facts relevant to this inquiry before the Court, she can not hope to recover on her failure to train claims.

Similarly, Plaintiff has failed to provide the Court with any evidence about the Borough's supervisory practices. Although Plaintiff has demonstrated that a supervisor (Giannantonio) was involved in the efforts to cover up the burglary of Plaintiff's home, she has failed to provide any evidence as to how the conduct of those to whom Giannantonio reported deviated from Borough policy, or how adherence to Borough policy by those to whom the officers reported would have prevented Giannantonio from covering up the crime. Given this absolute failure to demonstrate the manner in which departmental policy was deficient, or to show what changes departmental supervision might have prevented the crime, Plaintiff can not hope to succeed on her inadequate supervision claims.

IV. CONCLUSION

For all of the foregoing reasons, Defendants' motion for summary judgment is granted in its entirety. Because Plaintiff has not submitted sufficient evidence to succeed on the merits of her claims at trial, the Court need not reach Defendants' statute of limitations argument.

An appropriate Order follows this Opinion.

WILLIAM G. BASSLER, U.S.D.J.
Dated: March 27th, 2002

FOOTNOTES

1 Plaintiff's brief at times refers to the burglaries ceasing in 1994 and at times in 1995. In either event, there are no references in the record to any specific burglaries occurring after December, 1993.

2 Two other victims of the rogue officers' burglary ring, Mason and Connie Wang Hsu, brought a civil rights complaint against the Borough, the Police Department, and a number of the individual defendants. See Hsu v. Borough of Palisades Park, et al., 97-cv-666 (DMC). On August 24, 2001 this Court granted the municipal defendants summary judgment, on the grounds that Plaintiffs had failed to produce any evidence to support their claims. Plaintiffs appealed, and the Third Circuit affirmed in an unpublished decision on November 15, 2001.

3 The court finds it likely that this resident was in fact Mrs. Hsu, who commenced the action discussed in footnote 2.

4 Officer Anderson also testified that an internal investigation had been commenced by Detective Captain Framarin and Lieutenant Anthony Servis. Anderson stated that the investigation came about when Plaintiff's former husband reported his suspicions that police officers had been involved in the burglary. Plaintiff has not presented any evidence to indicate when her ex-husband made his complaint (i.e. whether it pre-dated the commencement of the Shu investigation), what action was taken based on his complaint, or whether any investigation stemming from his complaint concluded that officers were in fact responsible. The only evidence in the record of any statements by Plaintiff's ex-husband are in the brief section of Anderson's testimony included in Defendants' Appendix of Exhibits. (See Testimony of N. Anderson 8:5-10:4, Da 67.)

5 Plaintiff appears to have stated at her deposition that the FBI approached her in the Spring of 1996 with their suspicions that the burglary had been committed by police officers. Defendant argues that given her knowledge of police involvement in as early as 1996, Plaintiff's action commenced in 1999 is time barred. By way of response, Plaintiff claims she was mistaken at her deposition, and that she had no knowledge of police involvement until 1997, less than two years prior to commencing this action.

6 On August 20, 1999, the case was transferred, with the consent of the parties, to the District of New Jersey. Order of Shira A. Schendlin, U.S.D.J., dated Aug. 12,, 1999, Civ. No. 99—4182.)

7 Officer Anderson appears to have been named in a separate New Jersey Superior Court complaint, No. L-4359-98. According to Defendants, that action was

voluntarily dismissed by Plaintiff on February 14, 2001.

8 Although both Plaintiff's Complaint and Plaintiff's brief in opposition to summary judgment mention in passing that the municipality should be held liable for failing to screen the officers it hired, Plaintiff has put forth no evidence or argument as to why this is so. Plaintiff has failed to provide the Court with any evidence about the Borough's hiring process generally, or about how the officers who burglarized Plaintiff were screened. More importantly, Plaintiff has failed to provide any evidence about how different screening procedures might have averted the burglaries. Because a Plaintiff can not survive summary judgment on unsupported allegations alone, Defendants are entitled to summary judgment on Plaintiff's failure to screen claims.

9 Logic dictates that any Department which believes its officers will at all times adhere to their oaths will find it unnecessary to train its officers that they should not violate their oaths by committing crimes.

10 Mindful of this lack of evidence, the Court finds Plaintiff's reliance on Carter to be misplaced, because in Carter, the Third Circuit was confronted with a motion to dismiss, and not a motion for summary judgment. The relevant inquiry in Carter was whether the allegations in the Complaint could ultimately lead to relief, assuming adequate facts were discovered to support them. Because Carter's stated claim was not defective, the Circuit held that the plaintiff was entitled to proceed to discovery "to determine whether there was a practice of condoning perjury . . . or a pattern of police misconduct . ." 181 F.3d at 357.

Unlike the plaintiff in Carter, Plaintiff Hernandez has

already surmounted a motion to dismiss, and has had the opportunity to complete discovery. Therefore, this Court must determine whether, in a light most favorable to her, there is now sufficient evidence in the record of "deliberate indifference" by the Borough for liability to attach. Plaintiff cannot survive a motion for summary judgment merely on her well-pleaded allegations, although at times it stems that this is all she has attempted to do.

Civ. No. 99-3956 (WGB) ORDER
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LILLIAN HERNANDEZ,
Plaintiff,

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT and BOROUGH OF PALISADESPARK,
Defendants.

This matter having come before the Court on Defendants Borough of Palisades Park and Borough of Palisades Park Police Department Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56; and

The Court having considered the submissions of the parties; and

The Court having decided this matter without oral argument pursuant to Fed. R. Civ. P. 78; and

For the reasons set forth in the Court's Opinion filed this day; and

For good cause shown;

It is on this 27th day of March, 2002, hereby ORDERED that Defendants' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that the Clerk of the Court close this case.

WILLIAM G. BASSLER, U.S.D.J.

Supreme Court, U.S.
FILED
SEP 2 3 2003
OFFICE OF THE CLERK

No. 03-139

IN THE

Supreme Court of the United States

LILIAN HERNANDEZ,

Petitioner,

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT and BOROUGH OF PALISADES PARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Respondents accept the Facts as set forth in the Opinion of the Third Circuit Court of Appeals (Pet. Writ at 2a) but objects to Petitioner's Statement of the Case for the reasons set forth herein.

Importantly, Petitioner fails to substantiate many facts alleged in her Statement of the Case. The Statement of the Case is replete with multiple references to "testimony" without giving any citation or reference to support the factual propositions made. For example petitioner states at page 5 of Petitioner's Writ: "Former Police Officer Anderson *testified* that if a police officer wanted something he could have it as long as he kept his mouth shut. Both he and Sgt. Shirley also *testified* that it was common knowledge around the police department that police officers were committing similar crimes for years." (Pet. Writ at 5 C) The Petitioner fails to provide the transcript citation for this alleged testimony. However, even if these factual statements are accepted as true they are merely rumors and would not rise to the level of information that necessarily reached the ears of the Chief of Police.

In addition, Petitioner's factual assertions with respect to percentages of minority residents are similarly made without any evidential support in the record. Petitioner has continued a pattern of asserting factual arguments without providing the evidential foundation contained in the record below.

REASONS FOR DENYING THE PETITION

There are three questions presented by the Petition: (1) whether a municipality can be held liable under § 1983 for a series of constitutional violations committed by officials who are not Policy-makers per se; (2) whether a municipality can be held liable under the deliberate indifference standard, if Policy-makers ignored obvious constitutional misconduct; and (3) whether under the facts and circumstances of this case municipal liability should attach to the Borough of Palisades, under policy, custom, and/or deliberate indifference to Hernandez's constitutional rights. The answer to each of the Petitioners question is clearly no.

The Petitioner claims that the Borough of Palisades Park and the Borough of Palisades Park Police Department are constitutionally responsible for the actions of a few rogue officers. Petitioner correctly argues that five officers conspired to commit the crime of burglary against Mrs. Hernandez. However, the Petitioner is incorrect in asserting that the officers attempted to deprive "minority individuals" and "minority owned businesses" of their property. As Justice Brooks points out in his opinion for the Third Circuit Court of Appeals, "the District Court appropriately concluded that although specific police officers did commit constitutional violations, ***appellant introduced no evidence suggesting that the Borough had an official policy or custom of committing such violations.*** (Own emphasis added)

I. THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAW AND THE BOROUGH OF PALISADES PARK CANNOT BE HELD RESPONSIBLE

Municipal entities are only responsible for the violations of its police officers to the extent that the injuries arose from its policies or customs. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-695 (1978). The burglaries alone are insufficient to create a nexus between the municipality and the rogue officers. The Petitioner has done nothing but speculate as to links between the officers and policymakers.

A. The individuals responsible for the burglaries are not policy makers and attributing liability to the Municipality is improper.

As pointed out by the appellant, and established by the Court it is undisputed that the Borough of Palisades Park Chief of Police was the relevant policymaker at the time of the incident. *See* N.J.S.A. 40A:14-118, which states in part that ". . . any ordinance, or rules, or regulations, shall provide that the chief of police, if such position is established, shall be the head of all the police force and shall be directly responsible authority for the efficiency and routine day to day operations thereof." Even more specifically, the Police Manual to which the Court of Appeals cites states that "command shall be exercised by the virtue of rank" and the Chief shall have "complete authority over all police personnel functions and operations" and "shall set the administrative policies of the department."

The Police Manual also established that even if a member of the department is placed in a command position, the officer is expressly subject to discretion from higher authority. Clearly, the Chief of Police was the non-delegable policymaker and none of the rogue officers had standing to set policy. The assertions of the Petitioner that Lt. Giantanno could somehow set policy for the department runs counter to the evidence presented below as well as the applicable statutes and regulations.

All the evidence adduced below established that the Chief of Police was not aware of the illegal activity. In fact, the District Court found that there was no evidence in the record to prove any kind of indifference to constitutional violations. The Petitioner simply failed to provide any evidence that the municipality was aware information it was gathering was being used to commit burglaries. In fact, when the police department became aware of a potential problem, the Department turned over all of their files to the Bergen County Prosecutors Office for review.

B. Not only did municipal policymakers not act with deliberate indifference, but there was not obvious constitutional misconduct

Contrary of the assertions of the petitioner, no evidence was produced below which would demonstrate that policymakers ignored obvious constitutional misconduct. The petitioner's argument boils down to the fact that since there was rash of burglaries in Palisades Park, the policymakers should have known about possible constitutional violations. However, the mere existence and happenstance of burglaries is not in and of itself an indication of constitutional violations.

Regrettably, the burglaries of homes are not a rare occurrence, and it certainly would not alert the relevant policymakers to the possibility of constitutional violations. There was no evidence to suggest that the Chief of Police was aware that the police were involved in any wrongdoing. Moreover, as stated above, when the allegations of impropriety were alleged, the Chief of Police cooperated fully with the Bergen County Prosecutors Office.

The petitioner continues to assert that Lt. Giannantonio had the ability to set municipal policy. However, the Third Circuit clearly disposed of this argument by stating that the petitioner "introduced no evidence to suggest that Giannantonio was the commanding officer at the time of the robberies or that the Commanding Officer had final authority to set municipal policy". (Pet. Writ at 6a)

C. The Borough of Palisades Park did not have a custom or policy of violating the Petitioners constitutional rights.

The petitioner repeatedly cites to the officers who were charged and arrested for the crimes, however, petitioner is unable to cite to a policymaker who would confirm a policy or custom of violating constitutional rights stemming from the burglary of the petitioner's home. The petitioner sites a "pervasive mindset", which is a far cry from a policy or custom. The Third Circuit bluntly states "the appellant (petitioner) introduced no evidence suggesting that the Borough had an official policy or custom of committing such violations." (Pet. Writ at 5a)

As stated above, the Police of Chief was the relevant policymaker and the petitioner produced no evidence that would suggest to the fact-finder that an official proclamation or decision was made to set a policy of constitutional violations.

Similarly, the petitioner cannot point to a custom. The policymaker clearly did not have notice that a constitutional violation was likely to occur. Moreover, it is highly dubious that the police department would have a custom of burglarizing people's homes, and the custom would be so permanent and widespread as to have the force of law. It cannot be highly probable that police officers, who are sworn to uphold the law, would violate that mandate at every opportunity. The Chief of Police did not turn a "blind eye" to the officers' illegal conduct because he had no reason to know or suspect of the conduct. *The officers who were committing the crimes were hiding this fact, and the mere existence of burglaries cannot give rise to even constructive knowledge that the burglaries were taking place.* (Emphasis added) In her petition, the petitioner even catalogues the efforts the rogue officers went through to conceal their crimes, even falsifying records. (Pet. Writ at 10-11)

This case simply does not rise to the level of a municipal governmental constitutional violation. Clearly, the relevant policymaker had no actual knowledge of the violations. Furthermore, the deliberate efforts of rogue officers to conceal their illegal conduct demonstrates how unlikely it would be for the Borough of Palisades Park to have known about their criminality.

II. THE THIRD CIRCUIT'S RULINGS DO NOT DIRECTLY CONFLICT WITH OTHER CIRCUIT RULINGS AND THE DECISION DOES NOT CREATE A CLEAR AND IRRECONCILABLE CONFLICT WITH OTHER CIRCUITS

The petitioner cites several cases which, for reasons enunciated below, do not conflict with opinions of other circuits concerning policies, customs, or deliberate indifference of municipal entities.

In *Randall v. Prince George's County*, 302 F.3d 188 (4th Cir. 2002), the Plaintiff's contention in that matter was that the County maintained an unofficial policy of detaining persons against their will in the absence of probable cause. The court held that municipal liability can only be held for liable for a "widespread practice" but only if its continued existence can be laid to the fault of municipal policymakers, and a sufficient causal connection between the `municipal custom and usage' and the specific violation can then be established when and if: (1) the municipality must have "actual or constructive knowledge" of the custom and usage by its responsible policymakers; and (2) there must be a failure by those policymakers, "as a matter of specific intent or deliberate indifference," to correct or terminate the improper custom and usage. In the case at bar, the relevant policy maker had no actual or constructive knowledge, and there clearly was no deliberate intent to allow the alleged "custom" of burglarizing homes to exist.

In *Cozzo v. Tangipahoa Parish Council*, 262 F.3d 501 (5th Cir. 2001), the case merely restates principles of law enunciated in Third Circuit opinions. It is of no great moment when the petitioner reiterates that liability can attach if a

policy, although not authorized, "is so common and well settled as to constitute a custom that fairly represents the entity's policy." In fact, in *Cozzo*, the court found (much like the case at bar) that the official policy maker did not in fact delegate authority to underlings. This case is on point with *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), where the court held that the defendant city "acquiesced in a custom tolerating the tacit use of excessive force." This case simply does not conflict with the Third Circuit rulings because the issues have been similarly heard and decided.

The Petitioners reliance on *Billings v. Madison Metropolitan School District*, 259 F.3d 807 (7th Cir. 2001) is equally unpersuasive. The petitioner cites the case for the proposition that to establish a municipality has violated an individuals rights, they must prove one of the following: (1) that the city had an express policy that, when enforced, causes a constitutional deprivation; (2) that the city had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage within the force of law; or (3) that the plaintiff's constitutional injury was caused by a person with final policy-making authority. These were all factors examined by the district court as well as the Third Circuit Court of Appeals. It can hardly be stated that the Petitioner is asking the Court to examine a unique split in the law when different Circuits are utilizing similar factors.

The Petitioner looks to the Ninth, Tenth, and Eleventh Circuits to establish some sort of inconsistency between the Circuits. Her argument is unpersuasive. In sum, the case law looks to factors similar to those utilized by the Third Circuit. No matter what Circuit's case law is discussed, it is still necessary for the petitioner to establish a nexus between the

alleged custom or policy and the relevant law policymaker. As stated in *Cuesta v. School Board of Miami*, 285 F.3d 962 (11th Cir. 2002), a local government body can be held liable, if it can be said to represent official policy. In fact, all of the cases cited throughout the Circuits are consistent with *Bryan County Commissioners v. Brown*, 520 U.S. 397 (1997), where notice is generally established through a pattern of known constitutional violations. In the case at bar, there are clearly no known patterns of constitutional violations.

The Petitioner states that the lower Court in Hernandez held that a municipality will not be held liable if the unconstitutional conduct committed by Officers other than policymakers. This is clearly a misreading of the District Court and Appellate Court's holdings. Liability can attach to a municipality if the conduct was committed by officers other than policymakers, ***but only if it can be linked to a custom or official policy***. As we have seen, this ruling is clearly consistent with the holdings of other Circuits. There is clearly some measure of uniformity among the Circuits. Despite the assertions of the Petitioner, this case would have been decided the same way no matter where the case was heard. *The Petitioner's failure to produce evidence of a custom or a policy is a fatal flaw in her case and renders the pending Petition for Writ of Certiorari without any foundation. (Emphasis added)*

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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